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Supreme Court of the United States

OCTOBER TERM, 1998

LEGAL AID SOCIETY OF HAWAII, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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I. Introduction

While respondents offer various reasons for opposing *certiorari*, neither the Legal Services Corporation ("LSC") nor the United States government seriously disputes the importance of the issues raised by this case. In a nation committed to the rule of law, the imposition of severe and unprecedented restrictions on the ability of legal services lawyers to represent their indigent clients simply cannot be dismissed as insubstantial or trivial. To their credit, respondents do not even try. If anything, they implicitly concede that the question of whether and how poor people in this country can obtain access to justice is a fundamental one by any definition.

Given that common starting point, respondents rest their argument against review on two other grounds. First, they note that there is no conflict in the circuits. Second, they insist that the decision by the Ninth Circuit upholding the challenged restrictions is fully consistent with existing Supreme Court law. We acknowledge the former; we disagree vigorously with the latter.

To support their claim that this case involves nothing more than the application of previously settled law, respondents are forced to defend an extraordinarily broad proposition. According to respondents, this Court's cases establish the principle that once the federal government provides funding of any amount, it can impose a laundry list of restrictions on its grant recipients, notwithstanding the impact those restrictions have on the exercise of constitutionally protected rights and regardless of whether those restrictions are necessary to preserve the integrity of Congressional funding limitations. The only limitation on the federal government's power that respondents seemingly recognize is that grant recipients be allowed the option (however unrealistic it may be in the overwhelming number of cases) to create a separate entity to carry on the

restricted activities with separate management, separate staff and separate facilities.

In an era of nearly ubiquitous federal funding, the practical consequences of respondents' position for constitutional liberty in this country are indeed perilous. Extrapolating from the rule that the government is under no obligation to subsidize the exercise of constitutional rights, respondents read this Court's cases as permitting the government to use the power of its purse to inhibit the exercise of constitutional rights, even when the exercise of those rights is funded entirely by private money.

As set forth in our petition, we do not believe that this Court's cases go nearly so far. Rather, we believe that *Rust* v. *Sullivan*, 500 U.S. 173 (1991), *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), and *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), stand only for the more limited proposition that the government may take necessary steps to ensure that its money is spent only for its intended purposes. As those cases also demonstrate, the question of what steps are needed depends on the nature of the funded program and the character of the restrictions. Moreover, the government carries an extra burden of justification when it seeks to extend its regulatory power over a constitutionally sensitive arena (such as the provision of legal services) from restrictions on the use of the government's own money to restrictions on the use of nonfederal funds.

Thus, in *Regan*, charitable organizations that wanted to engage in lobbying were required to establish a separate corporate entity but were not otherwise required to separate their staffs and facilities. In *League of Women Voters*, the Court ruled that public broadcasting stations could not be barred from using private funds to engage in editorializing merely because they received public funds for other purposes. And, in *Rust*, the Title X restrictions

were upheld because they were seen as restrictions on a federally funded project rather than on the federal grantee.

To be sure, the implementing regulations adopted by the LSC in this case echo (although they do not precisely replicate) the regulations upheld by this Court in *Rust*. But by treating that fact as dispositive, respondents substitute analogy for analysis. The question is not whether LSC's regulations look like those in *Rust*. The question is whether the regulations that were deemed necessary and appropriate in *Rust* are necessary and appropriate here. If not, they should be struck down.

Finally, petitioners respectfully suggest that if this Court's cases in fact stand for the broad proposition that respondents assert, the present case provides an ideal opportunity to reexamine the constitutional jurisprudence of conditional funding so that it conforms, not conflicts, with the well-established rule that government may not accomplish indirectly what it may not do directly.

II. *Rust*

For respondents, and indeed for the Ninth Circuit, this case begins and ends with *Rust*. But respondents' single-minded reliance on *Rust* places them in an anomalous position. On the one hand, respondents argue that the disposition of this case requires nothing more than a comparison of the Title X regulations upheld in *Rust* and the LSC regulations challenged here. On the other hand, respondents only want to compare those portions of the regulations that in fact overlap. Thus, respondents are quick to abandon their literal reading of *Rust* when it does not suit their purpose. In particular, respondents insist that the two regulatory schemes should be treated identically despite the critical distinction that LSC grantees are barred from engaging in restricted activities except through the creation of a separate legal entity, while Title X grantees clearly are not.

This distinction was pivotal in *Rust*, and for very good reason. The federal government may have broad latitude in determining how its own funds are spent, but all parties agree that federal funding may not be conditioned on an agreement to relinquish the exercise of privately funded constitutional rights. *See, e.g.*, LSC Opp. at 13; U.S. Opp. at 16. Nor may the government avoid this constitutional rule by insisting that the constitutional rights of one group can just as easily be exercised by someone else. *See* Pet. at 20.

Of course, that is precisely the effect of the LSC regulations (but not the Title X regulations). Consequently, respondents shift rhetorical ground at this point in their argument and insist that the constitutionality of particular funding restrictions cannot be resolved by the slavish application of formal legal rules but instead demands a careful contextual analysis. Once having recognized the importance of context, however, respondents' literal-minded attempt to adopt wholesale the Title X regulations, and thereby render *Rust* dispositive of this case, irretrievably breaks down.

In *Rust*, Congress made funds available to pre-existing medical services organizations in order to allow those organizations to establish a federally-funded family planning program under the aegis of the existing organization. After repeatedly emphasizing[1] that Title X's restrictions were directed at a specific "project" and not at the "recipient" of federal funds, a majority of the Court found the restrictions imposed by Congress constitutional.

Here, by contrast, LSC's regulations take existing organizations (legal services grantees) and require them to cleave themselves into two inadequate halves if they wish

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[1] Literally, by repeated use of italics, *see* 500 U.S. at 196, 197.

to continue to receive federal funds. The point could not be more forcefully made than by the description on the very first page of LSC's Opposition brief in which it explains that for the past 25 years LSC grants have been made to pre-existing legal services organizations funded through a combination of LSC and non-LSC funds: "Congress envisioned that grantees [of LSC funds] would generate additional (nonfederal) financial support" for their activities. LSC Opp. at 1 (citing 42 U.S.C. §§ 2996e(a)(2), 2996i(c)). In fact, LSC notes that "applicants [for LSC funds] must describe a strategy for attracting non-LSC funds. As a practical matter, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources." *Id.* The new restrictions on LSC recipients' use of their *nonfederal* funds thus undermine the ability of LSC recipients to operate *in the manner envisioned by LSC*.

Furthermore, as respondents point out, there have been some types of restrictions on the legal representation that LSC grantees could provide using LSC funds since the beginning of federal funding in the mid-1970s. *See* LSC Opp. at 3; U.S. Opp. at 2-3. Prior to 1996, those restrictions were implemented by a system of strict bookkeeping requirements. *See* 42 U.S.C. § 2996g(b); 45 C.F.R. § 1610.9. So far as the record in this case reflects, those bookkeeping requirements have been fully adequate to ensure that restricted federal funds are not spent on unapproved activities.

It is against this backdrop that the Ninth Circuit should have applied this Court's recent funding limitation decisions, including *Rust*. Had it done so, as opposed to looking simply at the language of LSC's regulations and comparing it to the Title X rules, we believe that it would have concluded that—whatever the ostensible similarity of language—the practical operation of the rules in this case

is on the *grantee* (which *Rust* forbids) rather than on a particular *project* (which *Rust* permits).

Equally important, LSC's attempt to equate this case with *Rust* stumbles over the critical fact that, unlike the situation in *Rust* in which a *single* entity (*i.e.*, an organization with unified management and day-to-day operational direction) was required to set up a new program within the organization, LSC's rules contemplate two entirely separate organizations joined *only* at the level of their respective volunteer Boards.[2] Thus, LSC has made clear that an LSC recipient and separate "affiliate" organization may not (unlike in *Rust*) share the critically important "executive director," the practical determinant of whether a recipient maintains control of an affiliate.[3] And while it is fine for respondents to eschew reliance upon the formalities of corporate organization, it is disingenuous of them to insist that allowing two otherwise wholly separate organizations to have overlapping Boards satisfies the constitutional obligation of allowing an LSC grantee to exercise *its* constitutional rights.[4]

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[2] *See* 45 C.F.R. § 1610.8 and comment thereto (App. 179a-181a, 167a).

[3] Memorandum from John Tull, Director, LSC Office of Program Operations, to all LSC Program Directors, Board of Chairs, re Certification of Program Integrity (Oct. 30, 1997), Addendum to petitioners' Ninth Circuit Reply Brief.

[4] This critical distinction between the situation in *Rust* and the case at bar further explains why—for all of LSC's efforts to dismiss the importance of requiring separate corporations here, but not under Title X—that difference matters. (In fact, since LSC chose to copy virtually all of the Title X rules, one might fairly assume that where it failed to do so there was an important reason in *its* view for making the distinction.) That difference is not simply a matter of organizational form but stems from the fact that Title X really was just a new, and separate, medical services program within (and under the direction of) a single pre-existing organization, whereas LSC requires the creation of a parallel legal services structure in which the two organizations

(footnote continued...)

III. Standard

Respondents acknowledge that the unconstitutional conditions doctrine precludes the government from requiring a recipient of federal funds to relinquish his or her constitutional rights as a condition of receiving a federal grant. However, they say, that limitation is permissible so long as federal funding restrictions leave open "adequate alternative channels" for the exercise of grantees' rights. Whether that *should be* the test or, as petitioners assert, there should be a more stringent test which requires the government to establish the necessity of its regulations or the absence of a less restrictive alternative, is a critical question. Where respondents err is in suggesting that it already has been answered. To the contrary, it is precisely because it *has not* been answered that the Court should grant *certiorari* here.

Respondents, in fact, are disingenuous in suggesting that this issue is a "story told" in this Court's jurisprudence. Thus, while respondents confidently assert that the "adequate alternative channels" test is endorsed by prior cases, neither that phrase nor any reasonable synonym for it appears anywhere in *Regan*, *League* or *Rust*, nor can the Court's decisions in those cases fairly be read to have addressed the issue. At best, those opinions appear to implicitly acknowledge the existence of a lurking "standards" issue that would need to be faced in some future case. Far from decisively addressing that question, earlier cases merely contain snippets of rhetoric which each side can point to as sustaining its position on the standards issue—a point which LSC reluctantly is compelled to concede. *See*, *e.g.*, LSC Opp. at 29 n.30

(continued from previous page)
not only are *legally* distinct but are joined together operationally only in the most tangential and functionally meaningless respects.

("[t]he *Rust* Court did find in a footnote that 'the regulations are narrowly tailored to fit Congress' intent' . . . "); *see also League*, 468 U.S. at 401 n.27 (referring to application of "less restrictive alternatives" test in the government funding context).

Fairly read, this Court's prior cases implicitly pose, but do not resolve, the question of whether "necessity," "adequate alternative channels" or some other legal standard regarding burden, presumption and proof is required when the government seeks to enforce its conceded right to limit its own funding by imposing restrictions that materially burden activities involving no expenditure of federal funds.

As set forth in the petition, petitioners believe that the logic of the unconstitutional conditions doctrine—and of this Court's First Amendment jurisprudence generally—demonstrates that the burden of justification in cases like the present one should lie with the government and that it should be a heavy one. *See* Pet. at 23-29. But the important point—in fact, the *only* point—for present purposes is that this is an exceedingly important question which has been left open by prior cases and ought to be addressed as a logical, and needed, follow-on to those decisions.

IV. Facial Challenge

As anticipated, respondents contend that petitioners improperly advance a "facial challenge" to the LSC statutes and regulations. Respondents argue that LSC has not yet interpreted its regulations and therefore petitioners can only "speculat[e]" as to how LSC will apply them, thus assertedly precluding a "facial" challenge. LSC Opp. at 23-26; U.S. Opp. at 23-24.

Respondents' "facial" challenge argument fundamentally misconceives petitioners' claim. Petitioners claim is that the doubly-restrictive regulations

in this case—requiring recipients of LSC funds to (i) use separate personnel, separate management and separate facilities if they want to engage in LSC-disfavored activities with non-LSC funds *and* (ii) create entirely separate legal entities to do so—*on their face* go beyond what this Court has permitted in *Rust*, *Regan* and *League*.

Specifically, neither *Rust*, *Regan* nor *League* suggests that the government may, as it has done in the present case, *compound* restrictions upheld in each of those cases. To the contrary, petitioners submit that those cases establish that the government may impose only the *minimum* restrictions necessary to meet its interests, not, as respondents and the court of appeals would have it, *as many* restrictions as the government may see fit to impose so long as some "channel" of expression remains open to the funding recipient.

No further, or individualized, analysis of particular interpretations of the relevant language of LSC's restrictions is necessary to see that those restrictions are unconstitutional. *Every* potential LSC grant applicant faces regulations which—if petitioners are correct—go well beyond what the Constitution tolerates. LSC's restrictions therefore are facially unconstitutional whether one applies the standard urged by the government (U.S. Opp. at 11 n.6)—that the challenger must establish that "no set of circumstances exists" under which a challenged statute would be valid (*United States* v. *Salerno*, 481 U.S. 739, 745 (1987))—or the standard which petitioners contend applies in the First Amendment context—that the challenger may establish that a statute is "substantially overbroad," *i.e.*, that it reaches a "substantial" amount of

protected conduct (*City of Houston* v. *Hill*, 482 U.S. 451, 458 (1987)).[5]

V. Conclusion

For the foregoing reasons, as well as those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[5] Contrary to LSC's contention (Opp. at 23 n.19), petitioners repeatedly have argued that their claims are governed by "overbreadth" analysis. *See, e.g.*, petitioners' Ninth Circuit Reply Brief at 24.

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